SUPREME COURT, U. S.

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No. 403

Supreme Court of the United States

OCTOBER TERM, 1967

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

FRANKLIN J. CHAMBERS, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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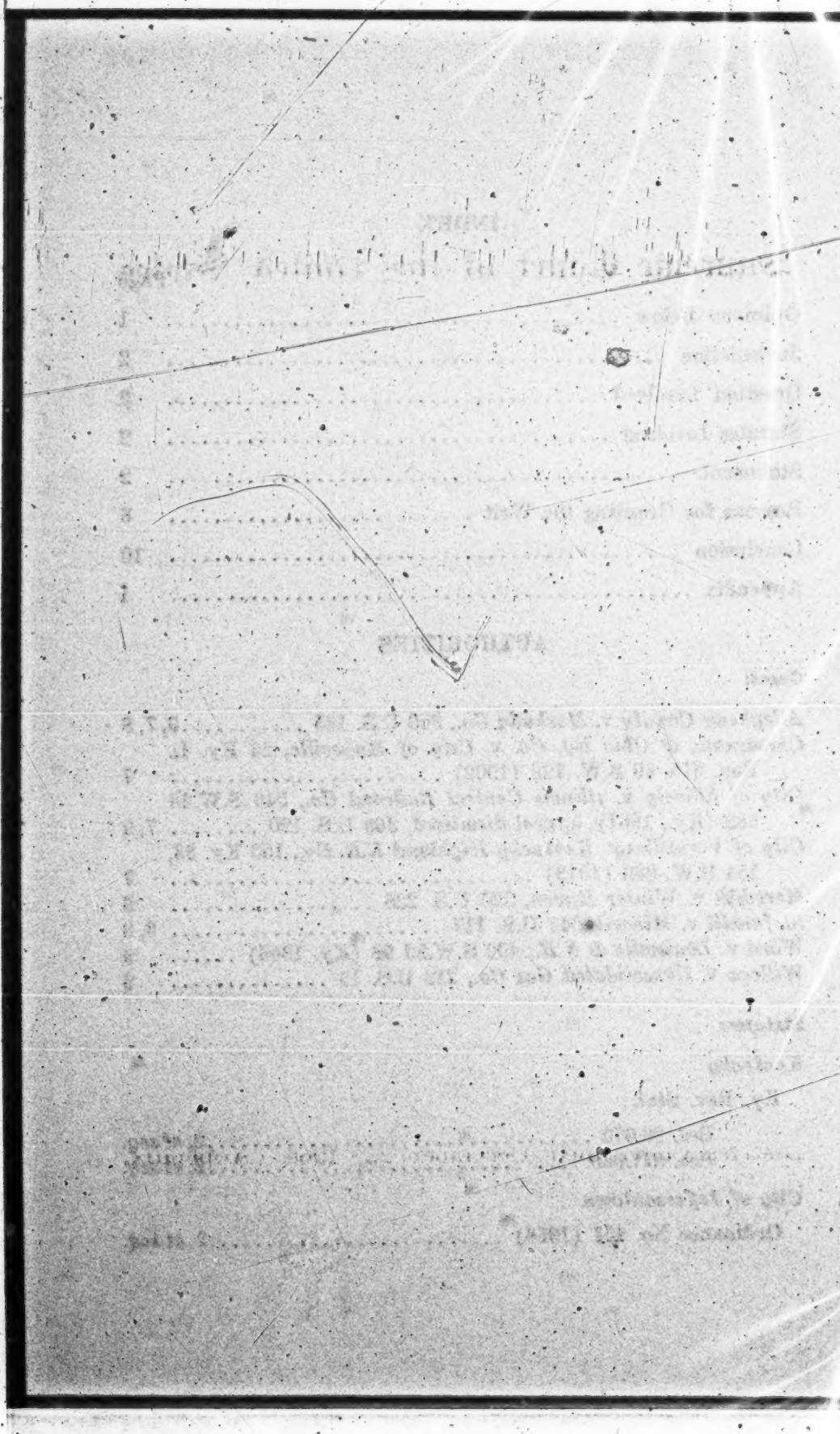

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above case.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court filed December 22, 1966 (Appendix, pp. 18a-19a) are unreported. The opinion of the Court of Appeals for the Sixth Circuit, dated April 25, 1966 (*infra*, pp. v-vi) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1967 (*infra*, p. vi). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION INVOLVED

Whether, under the circumstances of this case and the decisions of this Court, petitioner was properly refused the aid of the Federal courts in the exercise of their diversity jurisdiction in challenging the validity of a local ordinance and of actions taken by local officials under the color thereof.

STATUTES INVOLVED

The relevant portions of the Kentucky Revised Statutes (Secs. 96.070 and 277.065), and the text of Ordinance No. 451, approved by the City Council of Jeffersontown on September 12, 1966, are set out in the Appendix, *infra*.

STATEMENT

Petitioner, a Virginia corporation with its principal office in the District of Columbia, filed its complaint in the United States District Court for the Western District of Kentucky on November 28, 1966, naming as defendants the City of Jeffersontown, a municipal corporation of the Fourth Class of the Commonwealth of Kentucky, and Franklin J. Chambers, its Mayor, William E. Cummings, its Police Judge, Herbert Meyer, its Police Chief, and Richard M. Troutwein, its City Attorney (Appendix, pp. 3a-10a). Respondents moved to dismiss the complaint on December 16, 1966 (Appendix, pp. 15a-16a), and on December 22, 1966, the motion to dismiss was granted (Appendix, p. 20a).

The allegations of the complaint, which are thus taken as admitted, may be summarized as follows:

Petitioner, a common carrier by railroad, constructed and has operated for many years a railroad line on which the crossing here involved in Jeffersontown, Kentucky is located. Recently, the crossing was widened and a school constructed in the vicinity.

On or about June 15, 1966, respondent Jeffersontown became a city of the Fourth Class. Shortly thereafter, under the purported authority of Section 96.070 of the Kentucky Revised Statutes (*infra*, p. i), Jeffersontown enacted Ordinance No. 451, effective September 15, 1966. The relevant sections of the Ordinance read as follows (the full text is attached to the complaint, and is set out *infra*, pp. ii-iv):

> "Section 1. That the Southern Railway Company shall within sixty (60) days from the effective date of this ordinance erect and maintain automatic safety gates for traffic at the grade crossing of Six Mile Lane and a railroad owned and operated by the Southern Railway Company, a Virginia corporation;"
>
> "Section 3. That all grade crossings and rights of way shall be so designed, graded and maintained as to provide from street level at a distance of fifty (50) feet from the center of the grade crossing a visual line of sight of not less than one hundred (100) yards to both the right and left to the center of said rights of way;"
>
> "Section 5. That all railroads are required to erect and maintain suitable signs visible by day and by night, and to place suitable markings at all grade crossings requiring all vehicles to come to a full stop before entering such grade crossings,

said signs to be approved by the Chief of Police of the City of Jeffersontown;"

"Section 9. That any person, persons or companies that violate any of the provisions of this ordinance shall be fined not less than Ten Dollars ($10.00) nor more than Fifty Dollars ($50.00) for each separate violation or for each day that there is failure to comply with the provisions of this ordinance."

The cost of erecting the automatic safety gates referred to in Section 1 of Ordinance 451 is approximately $18,000, and the annual maintenance charge is approximately $950. There would be added expenses involved in complying with Sections 3 and 5.

Section 277.065 of the Kentucky Revised Statutes (set out *infra*, pp. i-ii) provides, in part, as follows:

"The entire construction costs of projects for the elimination of hazards of railroad-highway crossings, including the separation or protection of grades at crossings, and reconstruction of existing railroad grade crossing structures, . . . including, but not limited to, the cost of preparing the plans and specifications and supervising the improvement, . . . shall be allocated between the railroad involved, and the governmental unit or units involved in the same ratio as the net benefit received by such railroad from the project bears to the net benefit accruing to the public using the highway, and in no case shall the net benefit to any railroad or railroads be deemed to be more than ten percent of the total benefit resulting from the project. . . . The cost of maintenance of all structures for the elimination of railroad grade crossings, and of installations for the protecting of existing grade crossings, constructed or installed under this section, shall be borne by the governmental unit or units constructing them. . . ."

Jeffersontown has appropriated no funds to meet the commitment required of it by Section 277.065 and does not intend to do so.

On November 20, 21, 22 and 23 criminal summons charging violations of Ordinance 451 were issued against petitioner, requiring that it appear in the Police Court of Jeffersontown on November 28, 1966. Respondents, in their official capacities, will continue to cite petitioner and otherwise attempt to impose Ordinance 451 unless they are enjoined.

The complaint prayed for (1) an injunction against issuing further criminal summons directed to petitioner pursuant to Ordinance 451, (2) an injunction against prosecuting petitioner pursuant to the Ordinance, (3) an injunction against having the trial of the summons already issued, and (4) a judgment that Sections 1, 3 and 5 of the Ordinance are, as applied to petitioner, invalid (Appendix, p. 7a).

Respondents' motion to dismiss the complaint was granted (Appendix, p. 20a). The District Court found that there was diversity of citizenship and that the amount involved exceeded $10,000 (Appendix, p. 18a), but declined to grant an injunction on the grounds (1) that it could not stay proceedings in the Jeffersontown Police Court because no act of Congress expressly authorizes such an injunction, and that in its discretion it should not enjoin a criminal proceeding in the Kentucky courts, (2) that petitioner would not suffer irreparable harm by refusing an injunction, and has an adequate remedy at law in the state courts, and (3) that there was no substantial Federal question involved (Appendix, p. 19a).

On appeal to the United States Court of Appeals for the Sixth Circuit the judgment was affirmed (*infra*,

pp. v-vi). The court held that the District Court properly refused petitioner relief because petitioner had an adequate remedy under the laws of Kentucky, and that *Stefanelli* v. *Minard*, 342 U.S. 117, precluded its interferenee with the pending or prospective criminal prosecutions.

REASONS FOR GRANTING THE WRIT

The decision below represents an extreme application of the so-called "abstention" doctrine which appears to be in conflict with decisions of this Court, particularly *Allegheny County* v. *Mashuda Co.*, 360 U.S. 185, and *Meredith* v. *Winter Haven*, 320 U.S. 228.

There can be no doubt that the District Court had jurisdiction, based on diversity of citizenship, to decide the controversy; indeed, the court specifically so found (Appendix, p. 18a). Petitioner was therefore entitled at its option, absent some exceptional circumstances, to assert its rights in the Federal rather than in the State courts. *Meredith* v. *Winter Haven*, *supra*, at pp. 234-235. As the Court said in *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40:

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

The decision of the court below enunciates and applies a wholly different theory. Drawing, it appears,

on the traditional concepts limiting equity jurisdiction where there is an adequate remedy at law, the court approved the District Court's justification of its abstention—"in holding that appellant has an adequate remedy which it has not pursued under the laws of the Commonwealth of Kentucky" (*infra*, p. vi). This concept—that the right to have the controversy heard in the Federal courts is available only if and when remedies in the state courts are unavailable or have been exhausted—finds no sanction in any decision of this Court.

It may be conceded that petitioner has a remedy in the courts of Kentucky. Indeed, the case which is cited by the court below—*City of Shively* v. *Illinois Central Railroad Co.*, 349 S.W. 2d 682 (Ky., 1961), *appeal dismissed*, 369 U.S. 120—was a state court proceeding brought in circumstances similar to this, seeking an injunction against the enforcement of an ordinance which contained similar daily penalties for noncompliance. There are several other similar Kentucky cases in which the State courts have asserted their jurisdiction to restrain local officials from prosecuting under, and to enjoin enforcement of, local ordinances. See, *e.g.*, *Chesapeake & Ohio Ry. Co.* v. *City of Maysville*, 24 Ky. L. Rep. 615, 69 S.W. 728 (1902); *City of Versailles* v. *Kentucky Highland R.R. Co.*, 153 Ky. 83, 154 S.W. 388 (1913).

Under these circumstances, the conflict with the prior decisions of this Court could scarcely be more direct. In *Allegheny County* v. *Mashuda Co.*, *supra*, the Court agreed that the District Court had improperly declined jurisdiction, and reaffirmed that the doctrine of abstention was "an extraordinary and narrow exception to

the duty of a District Court to adjudicate a controversy properly before it" (360 U.S. at p. 188). Of particular importance here, however, is the fact that the Court found it significant that exactly the same suit as the plaintiff there had brought in the Federal court could have been brought in the State courts (see 360 U.S. at pp. 190, 191). Here, as there, to "order [petitioner] out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties" (*Id.* at p. 196). There, as here, "[petitioner] exercised [its] right under 28 U.S.C. § 1332 to institute the equivalent suit in the District Court based on diversity of citizenship" (*Id.* at p. 191).

A similar comment is applicable to the apparent reliance by the court below on the decision in *Stefanelli* v. *Minard*, 342 U.S. 117. If the Kentucky courts are open to suits in equity to enjoin local officials from seeking to enforce challenged ordinances by levying cumulative fines, there is no reason why precisely similar actions should not be maintained in the Federal courts. Moreover, the judgment affirmed by the court below denied not only the prayers for relief against the criminal prosecutions in the Police Court, but also the separate prayer for a declaration of the invalidity of Sections 1, 3 and 5 of Ordinance 451—a prayer to which the *Stefanelli* case can have no possible application. That it might determine the invalidity of the action taken by the City of Jeffersontown, and that such a decision might be *res judicata* in later criminal proceedings in the State courts is clearly irrelevant. *Allegheny County* v. *Mashuda Co., supra,* at pp. 197-198.

None of the other exceptional bases for abstention are present. Assumption of jurisdiction in this case would not disrupt a State administrative process, or interfere with the collection of state taxes or the setting of rates for public utilities, or otherwise create needless Federal-state friction. 360 U.S. at pp. 189-190. The Federal court would simply be acting as would a court of the State of Kentucky in insisting on compliance with state law.

Since the courts declined to exercise jurisdiction, the merits of the complaint are, of course, irrelevant. A word on that subject may nevertheless be warranted by reason of the reference in the opinion of the court below to the *City of Shively* case, *supra,* which was dismissed by this Court for want of a substantial Federal question. The ordinance there sustained was in many respects similar to Ordinance 451. The complaint in this case, however, unlike that in *City of Shively,* asserts a ground for relief not discussed in the opinion in *City of Shively,* namely, the failure of the City of Jeffersontown to comply with the requirements of Kentucky Revised Statutes, Section 277.065. That section, quoted at page 4 above, expressly requires an allocation of the costs of eliminating the hazards of grade crossings between the railroad and the governmental units involved, with the former's share in no instance to exceed 10 percent. That Section 277.065 applies to the installation of signal devices at a grade crossing—the action required by Ordinance 451—has been settled by the Kentucky Court of Appeals. *Ward* v. *Louisville & N.R.,* 402 S.W.2d 98 (Ky. 1966). Ordinance 451 makes no provision for sharing of the costs by the City of Jeffersontown for the new crossing gates, and it stands admitted by the motion

to dismiss that the city has appropriated no money for this purpose and does not intend to do so. The local officials are thus deliberately flouting a requirement imposed by the state law.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1967

APPENDIX

Statutory Provisions

1. Sections 96.070 and 277.065 of the Kentucky Revised Statutes provide:

Section 96.070 [3490-25] ***Fourth-class city may grant rights of way to utilities; conditions.*** The legislative body of any city of the fourth class may grant right of ways over the public streets or public grounds of the city to any utility company, on such conditions as seem proper, shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars. The legislative body may compel any railroad company to erect and maintain gates at street crossings and prevent railroads from obstructing public ways of the city, and fix penalties for the violation of these provisions. Nothing in this section shall prevent any property owner whose property abuts on a street on which a railroad is granted a right of way from recovering from the railroad any damage done to his property by the occupation or use of the street by the railroad.

Section 277.065 Allocation of costs of eliminating grade crossings between railroad and governmental units. The entire construction costs of projects for the elimination of hazards of railroad-highway crossings, including the separation or protection of grades at crossings, and reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate railroad grade crossings which may be paid for in whole or part from state funds, including, but not limited to, the cost of preparing the plans and specifications and supervising the improvement, the acquisition of necessary property, the construction of approaches, drainage structures, roadways and pavements, accommodations for public utilities, and damages paid to abutting property owners, shall be allocated between the railroad involved, and the governmental unit or units involved in the same ratio as the net benefit received by such railroad from the project bears to the net benefit accruing to the public using the highway, and in no case shall the net benefit

to any railroad or railroads be deemed to be more than ten percent of the total benefit resulting from the project. The Department of Highways shall be responsible for determining the proportion of the benefits derived by the railroad from the project, and shall fix standards for the determining of said benefits which shall be consistent with the standards adopted for similar purposes by the United States Bureau of Public Roads under the Federal-Aid-Highway Act of 1944. The cost of maintenance of all structures for the elimination of railroad grade crossings, and of installations for the protection of existing grade crossings, constructed or installed under this section, shall be borne by the governmental unit or units constructing them. Before any state funds shall be expended for any project constructed under this section, a contract shall be entered into between the railroad and the governmental unit or units involved setting forth the duties of each as to construction and maintenance of the project. (1958, c. 78, § 1; effective June 19, 1958)

2. Ordinance 451 of the City of Jeffersontown, Kentucky provides:

CITY OF JEFFERSONTOWN
JEFFERSON COUNTY, KENTUCKY

Ordinance No. 451, Series 1966

An Ordinance relating to

SAFETY IN OPERATION OF RAILROAD COMPANIES WITHIN THE CITY OF JEFFERSONTOWN

WHEREAS, it is deemed desirable for the City of Jeffersontown to exercise its police power in regard to railroads operated within the city limits of the City of Jeffersontown to protect the public safety, welfare and convenience; and

WHEREAS, Kentucky Revised Statutes, Section 96.070, provides express authority for the operation of said police power; and

WHEREAS, there has been constructed by the Jefferson County Board of Education a new high school at

the southeast corner of the grade crossing of Six Mile Lane and a railroad owned and operated by the Southern Railway Company, a Virginia corporation; and

WHEREAS, the City Council of the City of Jeffersontown has found that the volume of suburban traffic, including school buses and other school-related traffic, taken together with the number of trains, creates a serious hazardous condition that endangers the public safety, welfare and convenience;

NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF JEFFERSONTOWN, KENTUCKY, DOES ORDAIN AS FOLLOWS:

Section 1. That the Southern Railway Company shall within sixty (60) days from the effective date of this ordinance erect and maintain automatic safety gates for traffic at the grade crossing of Six Mile Lane and a railroad owned and operated by the Southern Railway Company, a Virginia corporation;

Section 2. That all railway companies using any rail line intersecting with any public street in the City of Jeffersontown shall give timely warning of the approach of said train by the ringing of a bell, or in the case of imminent danger, the sounding of a whistle, unless there are provided safety gates or a watchman at said grade crossings;

Section 3. That all grade crossings and rights of way shall be so designed, graded and maintained as to provide from street level at a distance of fifty (50) feet from the center of the grade crossing a visual line of sight of not less than one hundred (100) yards to both the right and left to the center of said rights of way;

Section 4. That it shall be unlawful for one or more railway trains to so operate as to prevent the use of a grade crossing by vehicles for a period of time exceeding five (5) minutes;

Section 5. That all railroads are required to erect and maintain suitable signs visible by day and by night, and to place suitable markings at all grade

crossings requiring all vehicles to come to a full stop before entering such grade crossings, said signs to be approved by the Chief of Police of the City of Jeffersontown;

Section 6. That all ordinances or parts of ordinances conflicting with the provisions of this ordinance are hereby repealed, insofar as the same affect this ordinance;

Section 7. That this ordinance shall take effect and be in force from and after its passage and publication;

Section 8. If any word or words, phrase or phrases, sentence or sentences, section or sections of this ordinance shall be declared unconstitutional or invalid for any purpose, it shall thereby not invalidate any other portion of this ordinance;

Section 9. That any person, persons or companies that violate any of the provisions of this ordinance shall be fined not less than Ten Dollars ($10.00) nor more than Fifty Dollars ($50.00) for each separate violation or for each day that there is failure to comply with the provisions of this ordinance.

PASSED AND APPOVED BY THE CITY COUNCIL OF JEFFERSONTOWN ON THIS DAY OF SEPTEMBER 12, 1966.

ATTEST:

FRANKLIN J. CHAMBERS, Mayor

BERNICE HOPKINS, City Clerk

Opinion of the Court of Appeals

No. 17651

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal from the United States District Court
For the Western District of Kentucky

SOUTHERN RAILWAY COMPANY, *Plaintiff-Appellant,*

v.

FRANKLIN J. CHAMBERS, *et al., Defendants-Appellees.*

Decided April 25, 1967.

Before Phillips, Edwards and Peck, Circuit Judges.

PER CURIAM. The appellant railway company filed this action to enjoin enforcement of a municipal ordinance which would require the railroad, among other things, at its own expense to erect and maintain safety gates for traffic at a railroad crossing within the corporate limits of the municipality. District Judge James F. Gordon refused to grant a preliminary injunction and dismissed the complaint upon the grounds stated in his findings of fact and conclusions of law, printed as an appendix hereto. Reference is made to the appendix for a more detailed statement of facts. The district judge continued in effect for a period of ten days a temporary restraining order restraining enforcement of the ordinance, in order to give appellant a reasonable period of time to seek equitable relief in the State courts of Kentucky.

Under date of January 18, 1967, this court entered an order enjoining enforcement of the ordinance pending a

decision on the merits of the appeal. The appeal was advanced for hearing to the February 1967 session.

The ordinance here involved is substantially similar to the ordinance which the Court of Appeals of Kentucky held to be valid in *City of Shively* v. *Illinois Central Railroad Co.*, 349 S.W.2d 682. The Supreme Court dismissed the appeal for want of a substantial federal question. 369 U.S. 120.

The complaint avers that the municipal corporation has issued criminal summonses against appellant railroad for violations of the ordinance. It is our opinion that the district court did not err in holding that appellant has an adequate remedy which it has not pursued under the laws of the Commonwealth of Kentucky and in refusing to exercise jurisdiction to enjoin enforcement of the ordinance under the facts of this case. *Stefanelli* v. *Minard*, 342 U.S. 117; *Grubbs* v. *Pound*, No. 17,075, March 23, 1967, (C.A. 6).

The injunction heretofore granted by this court is dissolved and the order of the district court is affirmed.

[The Appendix to this Opinion is included in the Appendix filed herewith, at pages 18a-19a.]

SUPREME COURT, U. S.

FILED

AUG 19 1967

JOHN F. DAVIS, CLERK

NO. 403

Supreme Court Of The United States

October Term, 1967

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

FRANKLIN J. CHAMBERS, ET AL., Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 403

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

FRANKLIN J. CHAMBERS, ET AL., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTION PRESENTED

The fundamental question presented now and earlier resolved by both the District Court and the Court of Appeals for the Sixth Circuit is:

> Did the Courts below abuse their discretion in declining to exercise jurisdiction in Petitioner's suit seeking to enjoin a State Court criminal proceeding and to invalidate an Ordinance of the City of Jeffersontown?

STATUTES INVOLVED

The statutes involved are Sections 2201 and 2283 of the Judicial Code of the United States, which provide:

> Section 2201: "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."
>
> Section 2282: "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

REASONS FOR NOT GRANTING THE WRIT

The decision of the District Court, affirmed by the Court of Appeals for the Sixth Circuit, recognizes that the jurisdiction of the Federal Courts is neither absolute nor all embracing.

Congress has always provided by legislation limitations on jurisdiction of all of the Federal Courts except the Supreme Court. *Sheldon* v. *Sill,* 49 US 441, 8 How 441, 12 L ed 1147 (1850); *Symonds* v. *St. Louis and S.E. Ry.,* 192 F.2d 853 (1911). The most

familiar limitation placed by Congress on the ability of a litigant to invoke Federal jurisdiction is the requirement that the amount in controversy exceed Ten Thousand Dollars ($10,000.00) exclusive of interest and costs. Title 28, USCA, Section 1332.

Southern Railroad has not previously demonstrated nor now submits that there is any Act of Congress authorizing injunctive relief, or that an injunction would be in aid of its jurisdiction, or that it would protect or effectuate its judgment. This limitation by Congress upon the exercise of equitable powers is no more than a recognition of the genius of the Federal System with its delicate balance of Federal-State relationships.

Even where Congress has not expressly limited Federal jurisdiction, as in Title 28, USCA, Section 2201, where provision is made for the obtaining of a declaratory judgment, the Federal Courts have themselves judicially fashioned the established rule that even though jurisdiction *may* exist, it does not follow that it must be exercised. *Walker* v. *Felmont Oil Corporation,* 240 F.2d 912 (1957); *Public Service Commission of Utah* v. *Wycoff Co.,* 344 US 237, 241, 243, 73 S. Ct. 236, 97 L ed 291.

A criminal proceeding in a State Court cannot be removed to a Federal Court "unless warrant therefor be found in some act of Congress". *Kentucky* v. *Powers,* 201 US 1, 24, 26 S. Ct. 387, 393, 50 L ed 633.

This is a criminal case. Diversity of citizenship and amount in controversy does not subject every

State Court criminal proceeding to a collateral attack. *Douglas* v. *City of Jeannette,* 319 US 157, 63 S. Ct. 877, 87 L ed 1324; *Stefanelli* v. *Minard,* 342 US 117, 123, 96 L ed 138, 144, 72 S. Ct. 118 (1951). This rule has been uniformly followed unless there is clear and imminent danger of obvious irreparable injury. *Dombrowski* v. *Pfister,* 380 US 479, 85 S. Ct. 1116, 14 L ed 2d 22 (1965). There the Court was faced with an obvious interference of free speech. Other examples would be incarceration without bail, unreasonable requirements for trial at points distant from the alleged commission of the crime, infringements upon religious freedom, and right of assembly.

Yet, rather than contending that there was a clear and imminent danger of irreparable injury by the State Court criminal proceeding that would justify Federal intervention, Southern has conceded that it has a remedy in the Courts of Kentucky. (Petitioner's Brief, Page 7).

Such cases as *Allegheny County* v. *Mashuda Co.,* 360 US 185, 3 L ed 2d 1163, 79 S. Ct. 1060, involve a state's exercse of eminent domain rather than the intervention by a Federal Court in a State Court criminal proceeding.

This is not a factual situation of first impression to this Court. In 1957, proceeding under the identical Kentucky Statute, the City of Shively, also a fourth-class city located in Jefferson County, Kentucky, enacted an Ordinance comparable to that in issue in the instant case. There Illinois Central Railroad Company

filed suit in the United States District Court asking for a declaration of rights as to the authority of the City of Shively to pass an Ordinance requiring the erection and maintenance of safety gates by Illinois Central within the City of Shively. (Unreported, United States District Court for the Western District of Kentucky at Louisville, No. 3343).

The action was dismissed as one involving a fundamental question of State policy requiring interpretation of a Kentucky Statute. The case was then litigated through the Kentucky State Court system, resulting in a decision reported at 349 S.W.2d 682 (1961). Kentucky Courts rejected identical arguments made herein and approved the Ordinance as a valid exercise of the police power of the State of Kentucky through its political subdivision, the City of Shively. On March 5, 1962, this Court in a Per Curiam Opinion, dismissed the appeal for want of a substantial Federal question. *Illinois Central Railroad Co.* v. *Shively, Kentucky,* 369 US 120, 7 L ed 2d 611, 82 S. Ct. 653.

The statement of and the logic of the law are clear. Federal jurisdiction is not absolute. Congress by enactment of the Anti-Injunction Statute has closely circumscribed the equitable jurisdiction given to the District Court. *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.,* 348 US 511, 75 S. Ct. 452, 99 L ed 600. The reasoning is particularly applicable to criminal prosecutions. *Stefanelli* v. *Minard,* supra. There is no clear and imminent danger of

obvious irreparable injury. *Dombrowski* v. *Pfister,* supra. The Federal Courts may discretionally refuse to exercise jurisdiction in actions seeking a declaratory judgment. *Public Service Commission of Utah* v. *Wycoff Co.,* supra.

Finally, this Court has previously found no substantial Federal question. *Illinois Central Railroad Co.* v. *Shively,* supra.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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